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November 8, 2004

TO: Each Supervisor

FROM: Thomas L. Garthwaite, M.D.
Director and Chief Medical Officer

f Jonathan E. Fielding, M.D., M.P.H.
Director of Public Health and Health Officer

SUBJECT: COMMERCIAL SEX VENUES

On September 7, 2004, the Board approved the Department's recommendations related to approval of an ordinance concerning commercial sex venues (CSVs), as amended to 1) include, as part of the regulations, requirements regarding the regulation of health and sanitation conditions; 2) instruct the Director of Public Health to report back to the Board within 60 days with a plan for unilateral action in the event the City of Los Angeles (City) does not adopt and ordinance; 3) in collaboration with County Counsel, the Director of Consumer Affairs, and the Business License Commission, review San Diego County's ordinance to determine if it is feasible to incorporate various requirements; and 4) in collaboration with County Counsel, report back on recommendations to either include Sexual Encounter Establishments in the ordinance or create a new ordinance in that regard.

This is a status report on these instructions.

Sanitation Requirements

When we issue the final regulations, we will include specific sanitation provisions to include clean laundered sheets and towels and cleanliness of the facility.

City of Los Angeles Approval

As authorized by the Board, the Chairman of the Board wrote to the Mayor and City Council President, urging adoption of the ordinance.

On September 22, 2004, the City AIDS Coordinator wrote to the City Council and Mayor, conditionally recommending adoption of the ordinance. He recommended that the City adopt the ordinance on the condition that:

- 1) The County explicitly indemnify the City for any expense incurred by the County as a result of DHS enforcement of the ordinance;
- 2) The City enabling ordinance require re-issuance or reauthorization by Council if the Health Officer makes significant revisions to the regulations; and
- 3) DHS notify the AIDS Coordinator's Office prior to the rescission or denial of a public health facility permit for a business establishment subject to the ordinance that is located within the City.

Department staff and County Counsel are discussing these proposed conditions with City staff to clarify questions about the meaning of condition #1. We are also concerned that condition #2 will limit the flexibility of adjusting the regulations periodically based on experience.

The City AIDS Coordinator has informed us that the City Council's Arts, Parks, Health and Aging Committee will consider the ordinance on November 16, 2004. County staff will attend. If approved by the committee, the ordinance could be before the full Council later in November or early December.

In the meantime, County Counsel has been analyzing options for unilateral implementation of regulations for commercial sex venues in the City of Los Angeles, based on existing State code. In the event that the City does not proceed with the ordinance, we will utilize the County Counsel analysis to develop unilateral strategies to regulate establishments within the City's limits.

Review of San Diego County Ordinance

The Department has conferred with the Director of Consumer Affairs and has attended two meetings of the Business License Commission (BLC) where the CSV issue was on the agenda. The BLC has not yet made any official findings on this motion, but after our discussions with them, Consumer Affairs, and our review of the San Diego ordinance, our department has reached the following positions in response to Supervisor Antonovich's motion. The operational and sanitation provisions will be addressed through the sanitation requirements we are adding to the regulations. Our current draft regulations already include a role for community-based organizations in HIV/STD counseling/testing and education. We do not recommend the prohibition of private rooms at this time. Finally, we have indicated to the BLC that we believe that background checks are more appropriately a licensing issue rather than a health issue.

The BLC has continued its discussion of this issue until November 17, 2004, including the possibility of recommending a separate licensing ordinance should any CSV wish to open in unincorporated County areas. Staff to the City's Police Commission testified at the BLC about the licensing and background checks for various categories of businesses in the City. We will continue to be available and in dialogue with the BLC regarding CSV's until such time that it is prepared to make its recommendations to the Board.

Sexual Encounter Establishments

Sexual Encounter Establishments (SEEs) are defined under the City of Los Angeles' Specific Planning and Zoning Article, Chapter I, Article 2, Section 12.70, along with several other definitions under the umbrella of Adult Entertainment Businesses. The list of SEEs which we received from the City staff includes the 11 bathhouses and sex clubs which we have identified, along with four other establishments which reportedly are bondage/discipline, fantasy or private lap dance types of facilities. It is our opinion that for the purpose of the County's health ordinance, the current definition of CSV is more efficacious, and would create less confusion than adopting the City's zoning term of SEEs.

Whenever a local authority wishes to assert its police power, there must be a nexus between what is being regulated and the reported purpose of the regulation. The stated purpose of the County's CSV ordinance is to require a health permit in order to mitigate the spread of HIV, AIDS and other sexually transmitted diseases (STD). Zoning ordinances, like the City of Los Angeles Municipal Code (LAMC) Section 12.70, have as their purpose the imposition of restrictions involving the time, place and manner of all sexually-oriented establishments. In general, business and/or police permits are intended to regulate certain high risk occupations in order to ensure that no illegal or nuisance activity occurs on or near the premises.

When the CSV ordinance was developed as a health code revision, requiring a public health facility permit, we specifically focused on the risk behavior occurring in the establishment rather than the specific zoning or business license category. In the County's ordinance, a CSV is defined as "any establishment that charges patrons or members a fee for admission or membership and which as one of its primary purposes allows, facilitates, and/or provides facilities for its patrons or members to engage in any high risk sexual contact while on the premises." This definition includes any business, no matter what it is called, that facilitates this high risk activity. For example, there is at least one business the City defines as a "motel" which staff believe may, upon further investigation, qualify as a CSV. We have not yet attempted to determine if the other facilities in the City which are SEEs or are in other Adult Entertainment Business zoning categories meet the definition of a CSV. However, we will begin this process if the City approves the ordinance.

A problem with using the City's definition of SEEs, instead of CSV, under the County ordinance establishing a Health permit requirement, is that the language of the SEEs definition is very broad, and would include all types of establishments where two or more persons congregate and are exposed to "specified anatomical areas." As written, the definition of SEE could include Adult Cabarets, Adult Bookstores, Adult Theatres, even some R-rated films, etc. Having such a broad definition for the health permit creates two major problems. First there is not sufficient scientific literature or known complaints, that the health officer is aware of, establishing that patrons of lap dances, Adult Theatres, Adult Bookstores, Bondage/Discipline Clubs contribute significantly to the spread of HIV, AIDS and STDs. Therefore, there is no requisite nexus between the purpose of the current CSV regulation and the regulated activity. Second, the SEE definition may include First Amendment-protected activities, thereby demanding a much higher standard of proof before any regulations of those activities are permitted.

In conclusion, the Department would not recommend the City's definition of SEE be included in the County's current CSV ordinance. It is possible that this definition could be useful in the County's zoning or business license ordinances. However, that analysis is beyond the health department's purview. We will continue to work with the BLC as its deliberations proceed on this matter. We will also continue to work with the AIDS Coordinator to obtain approval of the ordinance by the City and will provide you with an update by December 15, 2004. In the meantime, if you have any questions or need additional information, please let either of us know.

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c: Chief Administrative Officer
County Counsel
Executive Officer, Board of Supervisors
Business License Commission
Director of Consumer Affairs